SUPREME COURT, U. S.
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MICHAEL RODAK, JR.,

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-878

PACIFIC TRANSPORT COMPANY, et al.,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE

Petition for Rehearing of Order Denying Writ of Certiorari

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Petitioners respectfully pray that the Court accept this Petition for Rehearing and reconsider the decision to deny the issuance of the Writ of Certiorari, for the following reasons:

1. Possibly the Court thought that the type of issue found in this case was not truly important because it thought that the case involved only the question whether a deduction should be allowed in the year incurred rather than in installments thereafter in the form of depreciation. Under the facts of this case, that is not the situation at all. There is uncertainty whether any of the capitalized basis will be usable in any year other than 1959.

One issue which will remain to be decided in the Tax Court on the remand is whether any of the capitalization of the Pennsylvania loss would be applied in the years 1958 and 1957 since the deficiency letter disallowed it.

For the years after 1959, we expect respondent to take the position that the addition to basis of ships will not result in increases in deductions for depreciation. The explanation for this is found in the intricacies of the correlation between the income tax law and the Merchant Marine Act of 1936, as amended. Stated briefly, those complexities produce a result whereby the Internal Revenue Service may be expected to argue that the additional basis allocated to ships will be lost when the ships are exchanged for new ships and will not attach to the basis of the new ships, nor will it result in a reduction of gain on the exchange because the transaction is not one in which gain is recognized. The basis of the new ships will be governed, under respondent's interpretation of a closing agreement with the Treasury Department, by a carryover basis from ships long since gone from the fleet, and any adjustment for the Pennsylvania loss will be more than offset by reductions in basis because of payments from the capital reserve funds. Because neither gain nor loss will be recognized on the exchange of the old vessels for new ones, the basis of the ships will be unimportant at the time of the exchange, and respondent will hold that the basis will disappear in calculating depreciation on the new ships. The years the ships in the fleet in 1959 were exchanged for new ships are 1960 and 1961. Accordingly, petitioner will receive the benefit of the addition to basis, insofar as ships are concerned, only in 1959 for certain, possibly in 1957 and 1958 if the courts so hold on the remand, and probably none in later years.

Accordingly, the decision of the Court of Appeals does not merely shift deductions from one year to another but virtually denies the deduction forever. For reasons set forth in our Petition for Certiorari, such results should not be read into the Internal Revenue Code and should not be countenanced by the courts.

2. As we attempted to make clear in our Petition for Certiorari, the issue of deductibility or capitalization goes far beyond the boundaries of this case. An illuminating discussion with some additional areas in which the problem is present will be found in the article, "Liabilities and Purchase Price," by William B. Landis, at page 67 of Volume 27 (Fall 1973), *The Tax Lawyer*.[1]

In the course of the article, the author refers (at pages 75, 76) to the instant case as "an unhappy example." Of the relevance of this Court's decisions in *Woodward v. Commissioner*, 397 U.S. 572, and *United States v. Hilton Hotels*, 397 U.S. 580, relied on as decisive by the court below, the author stated that those cases were "a reasonable enough proposition but one which would not appear to have any real relation to the deduction of ongoing expenses of continuing a purchased business such as the loss suffered by Pacific Transport Co." The author obviously thought the decision below wrong.

As *The Tax Lawyer* article brings out in some detail, the consequences of nondeductibility crop up in many places and can affect the seller as well as the buyer in many transactions, and the tax question of contingency payments and contingency liabilities appears in so many areas that it should be settled as soon as possible. Illumination from this

1. *The Tax Lawyer* is the Journal and Bulletin of the Section of Taxation of the American Bar Association. This issue reached counsel for petitioners after the Petition for Certiorari had been printed.

Court on whether contingent liabilities are to be treated like fixed liabilities, and whether guidance may still be found in this Court's decision in *Metropolitan Edison* insofar as either type of liability is concerned, would go far to clarify the law, thus reducing multiplicity of litigation which has produced clogged dockets in the lower courts, a problem as real to litigants as the burden of work of this Court, and will also avoid the perpetration of a great and inequitable injustice to this taxpayer.

CONCLUSION

This petition and the petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Valentine Brookes, counsel of record for petitioners herein, certifies that the Petition for Rehearing of Order Denying Writ of Certiorari is presented in good faith and not for delay, and the petition is restricted to the grounds specified in U.S. Sup. Ct. Rule 58, 28 U.S.C.A.

VALENTINE BROOKES
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